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BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Before Commissioners: Robert G. Taub, Acting Chairman;
Tony Hammond, Vice Chairman;
Mark Acton;
Ruth Y. Goldway; and
Nanci E. Langley

Procedures Related to Commission Views **Docket No. RM2015-14**

COMMENTS OF FEDERAL EXPRESS CORPORATION

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UNITED STATES OF AMERICA
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Federal Express Corporation ("FedEx") respectfully files these comments in reply to Order No. 2602 (Jul. 21, 2015). 80 Fed. Reg. 44921 (proposed, Jul. 28, 2015) (to be codified at 39 C.F.R. pt. 3017). In that order, the Postal Regulatory Commission (the "Commission") invites public comments on proposed regulations (the "Proposed Rules") which will establish procedures for the development, pursuant to 39 U.S.C. § 407(c)(1) (2012 & Supp. I 2013), [1] of the Commission's "views" on rates for certain international postal services (the "Views"). FedEx would like to strongly commend the Commission for this important initiative. However, we believe the Proposed Rules need to be strengthened in important respects and their scope broadened.

The Views embody the Commission's determination whether a "rate or classification for a product subject to subchapter I of chapter 36" (i.e., a market dominant product of the U.S. Postal Service ("USPS")) established by "any treaty, convention, or amendment" is "consistent with the standards and criteria established by the Commission under section 3622," i.e., the

[1] All references to the U.S. Code refer to the 2012 Edition and Supplement I, 2013 unless otherwise indicated.

standards and criteria applicable to domestic market dominant products. The Views must be submitted to the Secretary of State before the Secretary can "conclude" an intergovernmental agreement establishing such a rate or classification, and the Secretary must "ensure that each treaty, convention, or amendment concluded . . . is consistent with the views submitted by the Commission except if, or to the extent, the Secretary determines, in writing, that it is not in the foreign policy or national security interest of the United States to ensure consistency with the Commission's views." 39 U.S.C. § 407(c)(2).

The Universal Postal Convention ("UPU Convention") is the principal intergovernmental agreement establishing rates and classifications for international postal services. The current UPU Convention, effective from 2014 through the end of 2017, was agreed in a general "Congress" of the Universal Postal Union ("UPU") held in Doha in 2012. Rates and classifications established by the UPU Convention apply only to rates of "designated operators" ("DOs"). DOs are public or private providers of international delivery services that have been designated by governments to comply with and benefit from provisions of the UPU Convention. With only a handful of exceptions, DOs are government postal administrations or their corporatized or privatized successors.

The current UPU Convention establishes rates or classifications for international postal services in three ways.

First, the 2012 UPU Convention establishes "terminal dues," the rates that DOs charge each other for local delivery of inbound of international "letter post" items – letters, flats, and small packets (packages weighing up to 2 kg). For USPS — and DOs in other industrialized countries and advanced developing countries — terminal dues are defined by a series of

calculations that begins with a formula that derives per kilogram and per item rates from selected domestic postage rates. The per kilogram and per item charges are limited by upper (cap) and lower (floor) limits and further restricted by a secondary cap which limits percentage increases from the prior year. The resulting rates are then adjusted by quality of service factors that are defined by a Regulation of the Postal Operations Council ("POC").[2] The Convention also provides for additional charges for registered items which may be adjusted by the POC Regulation.[3]

Second, the 2012 UPU Convention delegates to the POC authority to establish "inward land rates," the rates that DOs pay each other for local delivery of international "parcel post" items, i.e., packages weighing up to 20 kg.[4] Calculations that define specific inward land rates and related accounting procedures are established by additional Regulations of the POC.[5]

Third, the 2012 UPU Convention establishes a floor for outbound international postage rates. No DO may charge less for outbound postal services than for equivalent domestic postal services.[6]

The next UPU Convention will be adopted by the Congress meeting in Istanbul in September 2016. The rates and classifications that will be adopted are not yet known. In the past, however, Congress has ratified the rate proposals of the POC without significant change. Since

[2] The POC is a permanent council of the UPU composed of 40 DOs representing the countries that designated them. Other POC Regulations specify exactly how terminal dues are to be calculated, accounted for, and paid.

[3] 2012 UPU Convention, arts. 29-32, Letter Post Regulations (2013, Update 3, 2015), arts. RL 215-42.

[4] The weight limit for certain categories of the parcel post may be extended by the POC. 2012 UPU Convention, art. 13(6). Under this provision, the POC has recently established a new optional category of parcel post designed for e-commerce packages weighing up to 30 kg.

[5] 2012 UPU Convention, arts. 35-37. 2012 Parcel Post Regulations (Update 3, 2015), arts. RL195-96.

[6] 2012 UPU Convention, art 6(3) ("The charges collected . . . shall be at least equal to those collected on internal service items presenting the same characteristics (category, quantity, handling time, etc.)").

2013, the POC has been working on revised versions of the rate provisions in the 2012 UPU Convention. In addition, since May 2015 the POC also has been considering a new approach towards setting delivery rates which will merge the terminal dues and inward land rate systems into new rate schedules for documents and packages, perhaps further differentiated by priority of service and possibly including the delegation of more rate-setting authority to the POC. Whichever approach the POC eventually adopts, its rate proposals are due to be finalized in a February 2016 meeting.

Given this fluid situation, in this comment we shall use the term "terminal charges" to refer to UPU delivery rates for all of documents and packages weighing up to 20 kg. We shall use "terminal dues" and "inward land rates" to refer to the delivery rates for letter post or parcel post items as defined in the current UPU Convention.

1 The Commission's review of UPU terminal charges will have a substantial impact on the global system of "international postal services and other international delivery services" and on private U.S. providers of international delivery services.

The Commission's Views are of central important to the future fairness and efficiency of the global system of "international postal services and other international delivery services." 39 U.S.C. § 407(a). UPU terminal charges have a real, tangible impact on private providers of international delivery services. Terminal charges are available only to DOs and their customers. For most postal shipments of goods between industrialized countries, terminal charges are set well below equivalent delivery charges for similar domestic shipments. Industrialized countries provide even lower terminal charges for delivery of postal shipments from developing countries, a category that includes major producers of e-commerce goods such as China, Hong Kong, and Singapore. For small packets — by far the most important postal conduit for e-commerce

shipments — DOs in industrialized countries give each other discounts of about 50 percent compared to the delivery rates they charge their own citizens for similar domestic mail. Incredibly, small packets from China, Hong Kong, and Singapore receive discounts of 70 to 80 percent off of equivalent domestic postage.[7]

What this means in practical terms is that private international delivery services like FedEx could be viewed as less attractive options for economical end-to-end conveyance of international e-commerce goods because of the distortions created by terminal charges. If DOs in industrialized countries assessed each other terminal charges calculated according to the same principles that govern domestic rates, it would promote unrestricted and undistorted competition for international e-commerce and in many cases encourage partnerships between private transportation companies and the DOs in destination countries in a manner similar to FedEx's highly successful domestic partnership with USPS. Retail and online merchants in industrialized countries, including the U.S., are also being victimized by a UPU system of a terminal charges that effectively creates postal subsidies for foreign online merchants.

In recent years, the anti-competitive and distortive effects of terminal dues have been increasingly well documented. In a study prepared for the Commission last year, Copenhagen Economics concluded that the current system of terminal dues results in "six types of market distortions [including] distortion of competition . . . distortion of demand for delivery within and

[7] "Equivalent domestic postage" does not refer to full first class postage, but to 70 percent of first class postage. This is the standard the UPU uses to estimate how much domestic postage is equivalent to terminal dues. *See generally* James I. Campbell Jr., "A Revised Estimate of the Distortive Effects of UPU Terminal Dues, 2014–2017," paper presented at the Rutgers University Center for Research in Regulated Industries, 23rd Conference on Postal and Delivery Economics, June 3-6, 2015. A revised version of the paper will be published in M. Crew and T. Brennan, eds., The Future of the Postal Sector in a Digital World, Cheltenham, U.K.: Edward Elgar (late 2015).

outside the terminal dues system [and] financial transfers between delivery operators."[8] The USPS Office of Inspector General found that USPS charged China Post only 46 percent of attributable costs for delivery of inbound "ePackets" in 2012.[9] A 2013 report prepared for the European Commission found that "UPU provisions fixing terminal dues and restricting competition among postal operators appear to be incompatible with EU competition rules."[10] In 2014, the *Washington Post* reported "[USPS] is losing millions a year to help you buy cheap stuff from China."[11] Although the anti-competitive effects of inward land rates are less well known, they, too, appear to be significant.[12]

The U.S. Congress is also beginning to express concern. On June 16, 2015, the House Subcommittee on Government Operations held a hearing on discrepancies between the terminal dues available to foreign post offices and the domestic postage charged American shippers for similar shipments. After listening to witnesses from government, operators, and the on-line merchant Amazon, Chairman Mark Meadows summed the Subcommittee's dissatisfaction with preferential postal rates for foreign e-commerce shipments: "I can assure you this will not be the last hearing . . . because we're going to look for real results."[13]

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[8] Copenhagen Economics, *The Economics of Terminal Dues* (2014) at 11-12.

[9] USPS, Office of Inspector General, "Inbound China ePacket Costing Methodology: Audit Report," (2014) at 3.

[10] WIK-Consult, *Main Developments in the Postal Sector (2010-2013)* (2013) at vi. *Accord* Damien Geradin, "Legal Opinion on the Compatibility of the Proposed Target System for Terminal Dues with EU Law" (unpub. 2012).

[11] Jeff Guo, "The Postal Service is losing millions a year to help you buy cheap stuff from China," *Washington Post*, Sep. 12, 2014, http://www.washingtonpost.com/news/storyline/wp/2014/09/12/the-postal-service-is-losing-millions-a-year-to-help-you-buy-cheap-stuff-from-china. *See also* David Z. Morris, "The United Nations is helping subsidize Chinese shipping. Here's how," Fortune, Mar. 11, 2015, http://fortune.com/2015/03/11/united-nations-subsidy-chinese-shipping.

[12] See Ralf Wojtek, "UPU compensation rates for packages under EU competition law – Are there lessons to be learned from other international fee arrangements?" (see footnote 7 for presentation and publication details).

[13] David Z. Morris, "The U.S. is pushing to reform the international postal treaty that subsidizes Chinese shipping," *Fortune*, Jul. 3, 2015, http://fortune.com/2015/07/03/universal-postal-union-reform.

From FedEx's perspective, two points about this restricted and distorted competitive situation bear special emphasis. First, the UPU system handicaps the ability of private U.S. international delivery services to compete *on a worldwide basis*, not only in the U.S. outbound market served by USPS. FedEx and United Parcel Service ("UPS") have much more revenue at stake in the global small package market than USPS has in the outbound U.S. market. Second, two of the major private international delivery services, FedEx and UPS, are American companies. The anti-competitive effects of the UPU terminal charges system thus particularly impact U.S. international commercial interests.

As explained in the Copenhagen Economics report, "an optimal and nondistortionary solution would require that terminal dues . . . are set equal to the price for last-mile handling of domestic (and comparable) letter post items, adjusted for any cost differences between domestic and cross-border letters." Page 11. It is thus apparent the Commission's Views go to the heart of the distortions and anti-competitive effects of UPU terminal charges. By ensuring that terminal charges for inbound international mail received by USPS are fully "consistent the standards and criteria established by the Commission under section 3622," the Commission will set a standard for non-distortive, competitively neutral rates and classifications for the delivery of inbound international mail that will likely be emulated by regulators in other industrialized countries. By eliminating discrimination between terminal charges and comparable domestic rates, regulators can finally put an end to the political trap of dysfunctional discounting that threatens the efficiency and fairness of future international e-commerce markets.[14]

[14] The UPU officially adopted the goal of "country-specific" terminal dues in the 1999 Congress, but after three additional Congresses, it appears to be further from that goal on a global basis than it was in 1999. Indeed, it appears that the UPU system of terminal charges is no longer a net benefit to U.S. mailers, if it ever was. According to the rough of estimates of Campbell (see footnote 7, above), in the current terminal dues cycle (2014 through 2017),

At the same time, we emphasize that we are not suggesting the U.S. should abruptly withdraw preferential rates for delivery of social mail received from needy developing countries. Section 407(c)(2) properly allocates discretion to the State Department to moderate the effect of the Views in this respect. Taking account of U.S. foreign policy considerations, the State Department can and should overrule economically-grounded Views of the Commission to continue concessions to developing countries. Well-considered Views by the Commission, appropriately moderated by the Secretary of State, will go a long way towards realizing U.S. national policies of encouraging and promoting "efficient operation of international postal services and other international delivery services for cultural, social, and economic purposes" and "unrestricted and undistorted competition in the provision of international postal services and other international delivery services." Section 407(a).

2 The public inquiry established by the Proposed Rules must comply with the notice and comment procedures of the Administrative Procedure Act, 5 U.S.C. § 553.

The primary shortcoming in the Proposed Rules is their failure to incorporate the procedural safeguards of the Administrative Procedure Act (APA). In general, the Commission must employ APA procedures whenever it adopts a "rule." 39 U.S.C. § 503; *see* 5 U.S.C. § 551(1). There can be no reasonable doubt that the Views are a "rule" as defined by the APA. [15] Although there are several exceptions to the APA's notice and comment rulemaking requirements, 5 U.S.C. § 553, there appears to us to be only one that could plausibly be deemed

excluding Canadian mail, USPS will likely lose far more in the exchange of small packets with China, Hong Kong, and Singapore than they can gain from DOs and their mailers in other industrialized countries (a net loss of perhaps $175 million).

[15] Under the APA, a "rule" is defined very broadly and includes any " agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy" and includes, in particular, "the approval or prescription for the future of rates . . . or practices bearing on any of foregoing." 5 U.S.C. § 551(4).

applicable to development of the Views: the exception for rulemaking to "the extent that there is involved [a] foreign affairs function of the United States." § 553(a)(1). For example, notice and comment rulemaking has been held inapplicable to proposals developed by a federal agency which was implementing an intergovernmental trade agreement that involved negotiation of quotas for textile imports. The court concluded that notice and comment procedures would interfere with implementation of the trade agreement and infringe on the President's foreign affairs power.[16]

In drafting Section 407(c), however, it is clear that Congress carefully avoided the procedural dilemma created by combining regulatory and executive functions. Section 407(c) deliberately creates a bifurcated decision making process. First, under Paragraph (c)(1) the Commission determines "whether such rate or classification is consistent with the standards and criteria established by the Commission under section 3622." Second, under Paragraph (c)(2), the Secretary of State is obliged to implement the findings of the Commission ("ensure that each treaty, convention, or amendment . . . is consistent with the views submitted by the Commission") unless he (or she) "determines, in writing, that it is not in the foreign policy or national security interest of the United States to ensure consistency with the Commission's views." The responsibility of the Commission is to apply Title 39 to the rates and classifications under consideration. The responsibility of the Secretary is to protect the foreign policy and national security interests of the United States by limiting, if necessary, application of the Views of the Commission.

While the courts have never had occasion to elucidate this bifurcated process for approval

[16] *American Association of Exporters and Importers –Textile and Apparel Group v. United States*, 751 F.2d 1239 (Fed. Cir. 1985).

of intergovernmental postal agreements, in *South African Airways v. Dole*, 817 F.2d 119 (D.C. Cir. 1987), the D.C. Circuit considered a very similar bifurcation of regulatory and foreign policy functions in the context of international aviation services. Prior to the Airline Deregulation Act of 1978,[17] the courts held they could not review an order of the Civil Aeronautics Board (CAB) granting or denying the permit of a foreign air carrier (i.e., authorization to operate to and from the U.S.) because such CAB orders were subject to approval or disapproval by the President and the statute barred judicial review of orders subject to presidential approval. The Airline Deregulation Act, however, explicitly limited the role of the President to consideration of foreign policy and national defense interests.[18] As the result, the D.C. Circuit overruled objections by the Secretary of Transportation (who succeeded to the functions of the CAB) and held that it was appropriate for a court to review an order of the Secretary revoking a permit of a foreign air carrier because the order of the Secretary was necessarily limited to economic considerations and therefore judicial review of the order did not entrench on the President's foreign policy powers. The court explained,

> "Whereas the original text provided that 'any permit issuable to any foreign air carrier . . . shall be subject to the approval of the President,' with no restriction on the President's discretion, the new scheme allocates a much narrower role to the President. . . . The President may still disapprove such decisions, but only "upon the basis of foreign relations or national defense considerations which are within the President's jurisdiction." 49 U.S.C. app. Sec. 1461(a) (1982) (as amended by the Deregulation Act).
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> "Thus when the Secretary forwarded the Final Order to the White House, she was submitting it not for 'the approval of the President as provided in section 1461,' 49 U.S.C. app. Sec. 1486(a) (1982), but for his review and possible disapproval for foreign policy and/or national defense considerations." [817 F.2d

[17] Pub.L. No. 95-504, 92 Stat. 1705.

[18] See 49 U.S.C. § 41307 ("The President may disapprove the decision of the Secretary only if the reason for disapproval is based on foreign relations or national defense considerations that are under the jurisdiction of the President").

at 122 (emphasis added)]

The holding in *South African Airways* was confirmed and extended in *Aerolineas Argentinas, S.A. v. U.S. Department of Transportation*, 415 F.3d 1 (D.C. Cir. 2005). In that case, the D.C. Circuit held that a determination by the Secretary that Argentina had unjustly discriminated against U.S. carriers was subject to judicial review after expiration of the period in which the President could have, but did not, disapprove of the determination. The Court pointedly noted, "We should not lightly presume the Congress intended to grant the DoT an unreviewable discretion to engage in otherwise noxious decisionmaking." Id. at 5.

The bifurcated procedure for review of foreign airline carrier permits closely parallels the bifurcated procedure for review of international postage rates established by Section 407. *South African Airways* and *Aerolineas Argentinas* clearly imply that the Commission's Views may be subject to judicial review even if the Secretary of State's subsequent application of the "foreign policy or national security interest of the United States" may not.

An analysis of the scope of the foreign policy exemption from APA notice and comment procedures should follow the same logic. Under Section 407(c)(1), the role of the Commission is not to render a judgment with respect to foreign policy or national security. The role of the Commission is limited to a judgment with respect to the application of Title 39 criteria. By the same token, the role of the Secretary of State is not to review the conclusions of the Commission with respect to Title 39 but to implement those conclusions "except if, or to the extent, the Secretary determines, in writing, that it is not in the foreign policy or national security interest of the United States." Since Commission's Views do not involve a "foreign affairs function of the United States," the APA requires the Commission to comply with the notice and comment

procedures of 5 U.S.C. §553 in developing those Views. Indeed, the apparent appealability of the Views strongly implies the need for compliance with APA procedures to compile an appropriate record for review and to avoid summary rejection of the Views on procedural grounds. [19]

We urge the Commission, therefore, to fully incorporate the notice and comment procedures of 5 U.S.C. §553 into the Proposed Rules. This is not simply a matter of legal obligation. As administrative law commentators have pointed out, notice and comment rulemaking has many virtues: it will improve the level of public participation, provide a solid basis for agency decision-making and, if necessary, produce a complete record for judicial review.[20] In light of the importance of the Views to U.S. market players and their participation in the global e-commerce market through the end of 2021, the Views should be grounded in a complete and transparent evidentiary and legal record and fully explained in a "concise statement of . . . basis and purpose" (5 U.S.C. § 553(c)) that will enable interested parties and, potentially, a reviewing court "to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did."[21]

3 Comments on specific provisions of the Proposed Rules

§ 3017.1. Definitions. We suggest that the definition of the term "Views" should correspond to the scope of the Commission's obligations under Section 407(c)(1). That is, the term "views" should not be limited to the opinion the Commission provides to the Secretary of State "in the context of certain Universal Postal Union proceedings." Rather, the procedure

[19] *See, e.g., National Family Planning and Reproductive Health Assoc. v. Sullivan*, 979 F.2d 227 (D.C. Cir. 1992) (injunction against enforcement of substantive rules developed without APA notice and comment procedures).

[20] *See* J.S. Lubbers, *A Guide to Federal Agency Rulemaking* (5th ed., 2012), ch. 5.

[21] *Automotive Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968).

should apply to each opinion the Commission is obliged to provide to the Secretary of State "before concluding any treaty, convention, or amendment that establishes a rate or classification for a product subject to subchapter I of chapter 36." Section 407(c)(1) applies equally to all rates and classifications for international market dominant products established by the Secretary of State by intergovernmental agreement.

§ 3017.2. Purpose. No comment.

§ 3017.3. Establishment and scope of public inquiry docket. The Proposed Rules imply limits to the scope of proceedings that are not reflected in Section 407(c)(1). The section addresses only rates and classifications established by agreement at a UPU *Congress*. However, rates and classifications may also be established after a UPU Congress by the *Postal Operations Council* or by an intergovernmental agreement outside the scope of the UPU. Section 407(c)(1) requires the Commission to submit Views before conclusion of all rates and classifications established by intergovernmental agreement.

Paragraph (a) suggests that the Commission can limit its Views to a "high level" review of proposed rates and classifications, i.e., to "development of views on relevant proposals, in a general way." Section 401(c)(1), however, clearly requires the Commission to consider carefully all of the criteria set out in Section 3622 in light of the Congressional policies set out in Section 407(c). Nor can the Commission fail to provide Views on "specific relevant proposals" merely because they are not available "on or about 150 days before a Universal Postal Union Congress convenes." The Commission is obliged by Section 407(c)(1) to develop Views on specific proposals as they become available. The Department of State must ensure that intergovernmental agreements establishing postal rates and classifications afford the Commission an appropriate

opportunity to develop the necessary Views in conformance with U.S. law.

§ 3017.4 Comment deadline(s). We suggest that the provisions for deadlines and abbreviated procedures should conform to 5 U.S.C. § 553. We do not believe, for example, that "timely submission to the Commission's views to the Secretary of State" is an adequate justification for curtailing or eliminating the notice and comment procedures normally required by the APA.

§ 3017.5 Commission discretion as to impact of public comments on its views. The proposed language appears to overstate substantially the Commission's discretion in formulation of the Views. The Views largely entail the application of domestic rate making criteria (supplemented by the policy objectives of Section 407(a)) to domestic postal services, i.e., the delivery of inbound international mail after it has been received in an office of exchange of USPS. The Commission's discretion with respect to the "impact of public comments" is, we believe, limited by the APA, Title 39, and the general principles of U.S. administrative law, in essentially the same manner as in its review of domestic rates. Since these principles do not need to be repeated in the Proposed Rules, we suggest that this section should be deleted.

Respectfully submitted,

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